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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., *Appellants,*

vs.

PHIL GALLAGHER, AS STATE TREASURER OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

APPELLANTS' REPLY BRIEF ON QUESTION OF JURISDICTION.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT AND JANE SOUSA,

Appellants,

vs.

PHIL GALLAGHER, AS STATE TREASURER OF WASHINGTON; CLIFF YELLE, AS STATE AUDITOR OF WASHINGTON; ERNEST N. HUTCHINSON, AS SECRETARY OF THE STATE OF WASHINGTON; G. W. HAMILTON, AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON; B. GRAY WARNER, AS DISTRICT ATTORNEY OF KING COUNTY OF WASHINGTON; HARRY H. JOHNSTON, AS DISTRICT ATTORNEY OF PIERCE COUNTY OF WASHINGTON; RALPH E. FOLEY, AS DISTRICT ATTORNEY OF SPOKANE COUNTY OF WASHINGTON; A. W. SWANSON, AS DISTRICT ATTORNEY OF SNOHOMISH COUNTY OF WASHINGTON; H. W. COVALT, AS DISTRICT ATTORNEY OF WHATCOM COUNTY OF WASHINGTON; SMITH TROY, AS DISTRICT ATTORNEY OF THURSTON COUNTY OF WASHINGTON; PAUL O. MANLEY, AS DISTRICT ATTORNEY OF GRAYS HARBOR COUNTY OF WASHINGTON; JOHN D. EVANS, AS DISTRICT ATTORNEY OF YAKIMA COUNTY OF WASHINGTON; GLENN L. BEAN, AS DISTRICT ATTORNEY OF WALLA WALLA COUNTY OF WASHINGTON; SAM M. DRIVER, AS DISTRICT ATTORNEY OF CHELAN COUNTY OF WASHINGTON; K. M. O. INC., A CORPORATION; JOHN G. LOCKHART,

Appellees.

APPELLANTS' REPLY BRIEF ON QUESTION OF JURISDICTION.

Appellees' position is that because the court below declined to grant an interlocutory injunction, but on the contrary entered a final decree dismissing the bill of complaint, for alleged failure to set forth that the requisite jurisdictional amount was involved, this Court is without jurisdiction to review such holding on a direct appeal.

Appellees have confused jurisdiction of the Supreme Court, which is dependent upon the existence of a substantial Federal question, and jurisdiction of a Federal Court to entertain a bill. The important Federal question in this case is the constitutionality of a State Statute, Chapter 218, Laws of Washington 1937, p. 1070.

This Court has jurisdiction to review the decision below on direct appeal regardless of the ground upon which the bill was dismissed or the temporary injunction denied. Appellants have the same right to have the decision of the court below reviewed by this Court on direct appeal, irrespective of whether the decision was based on the merits or on the alleged insufficiency of the allegations of the bill respecting the jurisdictional amount. If this were not so, appellees would never be able to have the constitutionality of the Washington Statute here involved before this Court on direct appeal.

The question of whether the necessary jurisdictional amount has been established is one which this Court will review on appeal. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283; *Wetmore* v. *Rymer*, 169 U. S. 115, 119.

The cases cited by appellees go no further than to hold that a single Judge has the preliminary right to determine whether the bill presents a substantial Federal question.

In the case at bar, a single Judge (Judge Cushman), in the first instance, did determine that a substantial Federal question was presented by directing that the motion for a temporary injunction be heard before a court of three judges. The three-judge court did not hold that a substantial Federal question was not presented. It dismissed the bill and denied the temporary injunction solely on the ground "that neither the allegations of the bill of complaint nor the record shows that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000."

Appellants contend that the court erred in dismissing the bill and denying a temporary injunction on this ground; that the bill showed that the amount involved was in excess of $3,000; that these allegations were supported by affidavits and that appellants offered to further support these affidavits by oral testimony, which offer was refused by the court below; and that the Statute is a clear invasion of appellants' rights under the Federal Constitution, and that the decree should be reversed and the case remanded to the court below with instructions to that court to consider appellants' motion for an interlocutory injunction on its merits.

If this Court should find, as appellants contend, that the complaint does contain sufficient allegations to support the claim of the necessary jurisdictional amount and if this Court should further find that there is a substantial Federal question involved, it will be necessary to reverse and send the case back to the three-judge court below for a consideration of the merits of appellants' motion for an interlocutory injunction. *Cuyahoga Power Co.* v. *Akron*, 240 U. S. 462, 463.

Appellees completely ignore appellants' contention that the court below had jurisdiction regardless of the amount involved in view of the substantial claim that the State Statute denies equal protection of the laws and denies to complainants certain privileges and immunities of citizens of the

United States (*cf.* "Question 2" of appellants' "Statement as to Jurisdiction", p. 14, citing *Raich* v. *Truax*, 219 Fed. 273, 283, aff'd 239 U. S. 33). If this contention be sustained this Court likewise must reverse the decree below and remand the cause for consideration of appellants' motion for interlocutory injunction by a court of three judges pursuant to Section 266 of the Judicial Code (Title 28, U. S. C., § 380).

Unless this Court entertains this appeal, appellants will be denied the right to review the action of the court below and to have the case sent back to that court for appropriate action. No writ of certiorari can be applied for because the decree appealed from was made by a district court and not by a circuit court of appeals. Appellants may not appeal to the Circuit Court of Appeals because the proceeding below was one that could be heard only before a court of three judges under Section 266 of the Judicial Code, from whose decree an appeal lies only to this Court. This Court alone is vested with jurisdiction to correct the decision below in the manner prescribed by Section 266 of the Judicial Code. The cases cited in both appellants' and appellees' briefs support the jurisdiction of this Court.

Respectfully submitted,

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.